Can a single word change our restrictive beach laws?

By **Billy Baker** Globe Staff, Updated September 9, 2021, 5:08 p.m.

Beachgoers walked beyond a private beach sign at Good Harbor Beach in Gloucester. Massachusetts is one of only two states that allow private citizens to own land down to the low tide line. ERIN CLARK/GLOBE STAFF

"By the law of nature," the Roman law begins, "these things are common to all mankind; the air, running water, the sea, and consequently the shores of the sea."

Known today as the Public Trust Doctrine, this principle has stood as a bedrock of self-governance, from the Justinian codes of ancient Rome, through the Magna Carta, to the American colonies by way of England.

It was there, in a place known as the Massachusetts Bay Colony, that it fractured.

Thanks to a well-meaning ordinance approved by the king of England in the 1600s, modern Massachusetts (as well as Maine, due to the fact that it was once part of Massachusetts) today has what are considered the most restrictive ocean access laws in the country.

Now, two legislators on Cape Cod are hoping to reverse that history with a single word: recreation.

In most coastal states, private ownership of oceanfront land is allowed only to the high tide line. In a few, such as Hawaii and Oregon, no one can own any part of a beach; they are entirely public. But thanks to the "Colonial Ordinances of 1641-1647," which allowed for the building of private wharves to bolster maritime trade, private citizens in Massachusetts and Maine can own land all the way to the low-tide line, allowing them to exclude the public from the intertidal zone, the area between the high and low tide lines that spends much of the day underwater. In short, the ordinances allowed not only the creation of private beaches, but the unprecedented ownership of the sea itself.

Under the Massachusetts interpretation of the Public Trust Doctrine, a state law known as Chapter 91, the public can access "private tidelands" for only three purposes: "fishing, fowling, and navigation." When it was formalized in 1866, Chapter 91 was meant to protect how the public customarily used the sea. But times have changed, and Senator Julian Cyr and Representative Dylan Fernandes, who represent the Cape and the Islands, say the law should reflect how the public uses the seashore in modern times, which is more likely to involve a stroll or a beach chair than a shotgun or a fishing rod.

"No individual should be allowed to own the ocean or the sand beneath it," said Fernandes, a Democrat who grew up in Woods Hole. "I view that as morally wrong."

The proposed bill would add "recreation" to the "fishing, fowling, and navigation" protections in Chapter 91. To avoid future confusion, the bill defines recreation in the

broadest terms possible — "the use of land for relaxation, exercise, watersports or other enjoyable pastimes."

"Today we have a real perversion of the Colonial acts," said Cyr, a Democrat from Truro. "This is updating Chapter 91 so it reflects the intent of the colonial acts, for fishing, fowling, and navigation were the 'recreation' of their day. And by clarifying the intent of the law, we're hoping to avoid the very challenging issues around ownership that people have run into in the past."

Challenging may be an understatement, for Cyr and Fernandes are far from the first to attempt to reclaim the intertidal zone from private owners. In 1907, an individual sued for the right to swim in private tidelands, and the state's high court upheld Chapter 91, ruling that swimming was allowed only if the swimmer's feet never touched the ocean floor.

In the 1970s and '80s, then-Senate president William Bulger spent years trying to rewrite the law after he and his family were chased off a private beach. His proposal, while popular, went nowhere after the state's high court issued an advisory that it would be unconstitutional to move property lines back to the high tide mark without compensating the owners for their loss, an astronomically expensive prospect. Another Bulger-backed measure to allow people to simply stroll below the high tide line went nowhere.

In Maine during the 1980s, the issue came to a head over Moody Beach in Wells, with citizens filing suit demanding the right to recreate on the private tideland. The state Legislature got involved and passed an act granting the public "recreation" rights in the intertidal zone, but the Supreme Judicial Court ruled it was unconstitutional without compensating the homeowners, and reaffirmed the only protected uses as fishing, fowling, and navigation. Several subsequent legal challenges have failed to alter that ruling.

Today in Massachusetts, even those three protected uses are subject to harassment

because the law is little known to the general public, say those who legally walk past "no trespassing" signs with a fishing rod in hand.

"I can't even tell you how many times I've had people screaming at me to get off their private property when I'm fishing on a wet rock," said Brian O'Connor, a longtime surfcaster on the North Shore. "And imagine what kind of personality you're running up against when you're trying to explain Chapter 91 to someone in a $3 million house who is threatening to call the cops."

Chris Kieser, an attorney for the Pacific Legal Foundation, a nonprofit that defends private property rights, said that the proposed bill is morally wrong and that biases against waterfront property owners are clouding the issue.

"If this weren't a beachfront issue, people would understand the government can't come in and do X, Y, and Z with your land without paying for it," he said. "The property owners took their title with the expectation that they own to the low water mark. The government can't just define away your property by changing the law."

But Peter Shelley, an attorney for the Conservation Law Foundation who has been working to expand beach access since the 1980s, said the issue will become more pressing in light of climate change.

"It's going to come to a head with sea level rises and increased storm activity, because a lot of these private land owners are going to be looking for public money to protect their property," Shelley said. "From my perspective, there's a quid pro quo involved in this, and it's access. Make it available to the public, or pay for it yourself. Otherwise, lose the beach."

In Massachusetts, beachgoers have grown accustomed to large sections of the coast being off-limits. Even when beaches are public, parking restrictions and designated access points often make it difficult for visitors to reach them. For the rest of the country, it's a perplexing, offensive system that belies the state's progressive image.

"When you talk to people on the West Coast or in Hawaii, their mind is blown that we can't go to a beach, or you have to pay to park, or you can't park at all because it's

'residents only,' " said Alex Vai, the volunteer campaigns coordinator for Surfrider Foundation Massachusetts Chapter, a California-based nonprofit that collaborated with Fernandes and Cyr in crafting the bill.

"The notion that it's tougher to access the ocean in Massachusetts than anywhere else in the country does not jibe with how the state presents itself to the world," Vai said.

Andrew Kahrl, a professor at the University of Virginia who studies the history of race, real estate, land use, and taxation, and has written extensively on the problems of restrictive beach laws, said what's happened in Massachusetts is symptomatic of a broadly exclusionary society.

"Beaches are public spaces. The public has a right to enjoy them," he said. "We're not just talking about a legal right, but a question of what society we want to live in. Do we want to live in a society where access to outdoor resources, the essential element of healthy living, are restricted to a privileged few?"

The proposed bill has yet to have a hearing, and has not received any publicity until now. Both Cyr and Fernandes said they are anxious to see how it lands in the court of public opinion.

"I am sure that many wealthy waterfront homeowners will be rankled over the idea of people potentially enjoying a walk in the tidal area behind their houses," Fernandes said. "But I am totally fine with taking a political hit to ensure that no individual person owns the ocean."

John Organ, a former University of Massachusetts professor who is considered a scholar on the Public Trust Doctrine, said the coastal situation in Massachusetts violates something innate to humanity. "I believe that from the moment our species had modern cognitive abilities, we had the sense that certain things were, by nature, wild, and could

not be owned by anyone, whether that be the animals or the sea," he said.

The late Joseph Sax, a professor at the University of Michigan and perhaps the preeminent scholar on the doctrine, put it best, Organ said. "The free availability of those natural uses defines a society as citizens rather than serfs," he wrote.

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